United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7383

B
P/S

In The

United States Court of Appeals

For the Second Circuit

JACK A. KAMPMEIER, et al.,

Plaintiffs-Appellants,

vs.

EWALD NYQUIST, et al.,

Defendants-Appellees.

On Appeal from the Decision and Order of the United States District Court for the Western District of New York

Civ 76-167

BRIEF FOR DEFENDANTS-APPELLEES, HARRIS, BENT, AND HIBSCHMAN IN HIS CAPACITY AS SUPERINTENDENT

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Daily Record Corporation
Rochester, New York

(2329)

TABLE OF AUTHORITIES CITED

STATEMENT OF THE CASE

Appellants here seek to reverse an Order, issued by the United States District Court for the Western District of New York (Burke, J.), dated July 27, 1976, which denied Appellants' application for a preliminary injunction.

This action was brought by two public junior high school students and their parents against officials of the New York State Education Department and the commissioner and school board members of their respective school districts. The students, each of whom is functionally blind in one eye, in this action seek to be permitted to participate in so-called contact sports conducted by the school.

The student, Margaret Kampmeier, was found not qualified for participation in contact sports after examination by the School Physician for the Pittsford Central School District, and, in accordance with regulations and guidelines of the New York State Education Department, the School District has acted in reliance on that medical decision and denied permission to engage in school contact sports.

All references hereafter are to the Appendix annexed to the Appellants' brief.

STATEMENT OF ISSUES

Whether Appellants should be entitled to an injunction mandating that the School Districts shall not deny the infant Appellants participation in school contact sports.

Whether Appellants have demonstrated that they will suffer irreparable harm because they are prevented from participation in school contact sports.

The District Court answered both questions in the negative.

ARGUMENT

I. APPELLANTS ARE NOT ENTITLED TO AN INJUNCTION PERMITTING PARTICIPATION IN SCHOOL CONTACT SPORTS

A New York State School District is required by 8 N.Y.C.R.R. §135.4(c)(7)(i)(h) to act in reliance on their medical officers' opinion with regard to the participation of students in various levels and types of athletic competition. This is required regardless of any offer of indemnification by the parents. Matter of Columbo (Nassau Co. Sup. Ct., 5/20/76); Matter of Spitaleri Decision #8540, 12 Ed. Dept. Rep. 84 (Nov. 15, 1972).

The decision reached by the School Physician was to prevent participation for infant Appellant Kampmeier, and that decision was in accordance with guidelines of the New York State Department of Education (A-43 to A-46) and the American Medical Association (A-31 to A-43).

Appellants first argue that they will be entitled to the relief sought either under 29 U.S.C. 701 et. seq. (specifically §794). However, that section does not require that handicapped persons be treated without regard to their handicaps, but only that there be a compelling justification for different treatments. Hairston vs. Drosick (U.S.D.C., S.D., W. Va., 1976), cited by Appellants, indeed held that a minimal handicap was insufficient for the total exclusion which occurred in the facts of that case, however, it also acknowledged that 29 U.S.C. §794 would not be violated where there was a ". . . bona fide educational reason . . ." or ". . . compelling educational justification . . ." This case presents a minimal restriction (exclusion only from contact sports) and a bona fide educational and medical reason, ie. reduction of risk to the remaining good eye of the Appellant.

In summary, 29 U.S.C. §794 only excludes different treatment of handicapped persons where they are not "otherwise qualified". It is submitted that the handicap of Appellants creates an unreasonable risk, both for Appellants and for other students participating in contact sports with Appellants,

such that they are not "otherwise qualified". The minimal exclusion of Appellants from contact sports cannot be found in violation of 29 U.S.C. §794.

The equal protection argument of Appellants is equally to no avail, and the cases cited do not indicate that Appellants are likely to succeed on the merits in this matter. Suemick vs. Michigan High School Athletic Association (U.S.D.C., E.D., Mich., 1973) involved a handicap of loss of a lower leg where medical affidavits showed no risk to the student or others playing football with him. Borden vs. Rohr (U.S.D.C., S.D., Ohio, 1976) involved an adult college student and the Court rested its decision, in part, upon the adult having the right to risk his own eye. Such a situation does not arise where a junior high infant is involved who may be without perception of the catastrophic risk involved and patently unable to waive and indemnify that risk.

The minimal restriction involved here, restriction from school contact sports, is not of such a nature that it involves a "suspect" classification. Instead it is based on medical examination and opinion. Thus the case is subject to the standard of rationality which tests whether the challenged classification bears a reasonable relation to legitimate legislative objectives. Dandridge vs. Williams 397 U.S. 471 (1970). This matter does not appear to affect a "fundamental interest" or employ a "suspect" classification, justifying imposition of the strict scrutiny test. Shapiro vs. Thompson 394 U.S. 618 (1969). However, under either test it would

appear that the minimal exclusion from contact sports is both reasonable and serves a purpose so compelling as to justify the means utilized. The purpose of the public school system is to develop and educate infants so as to prepare them for their future. Permitting participation only in non-contact sports is a proper and minimal intrusion by the State where it is based on a medically determined risk.

II. APPELLANTS HAVE NOT SUFFERED IRREPARABLE HARM AS A RESULT OF NON-PARTICIPATION IN SCHOOL CONTACT SPORTS.

Appellants have also failed to show that irreparable harm will result, on the balance, due to the non-participation in contact sports. There is an allegation that such harm will occur, but no showing, medical, psychological or otherwise, has been offered to show that the exclusion only of contact sports will have such an effect.

The District Court which was required to weigh the parties' respective injuries where a preliminary injunction is sought, and where the public interest is involved, should also consider the effect of the granting or denial of that preliminary injunction upon that interest. Yakus vs. United States 321 U.S. 414 (1944).

This case presents an infant who can be expected to be more swayed by the short-run desire to play each and every

sport than by the risk of loss of sight. Where a state guideline is supported by medical opinion that an undue risk is present, then a preliminary injunction against such a minimal and justifiable restriction is not warranted. It should be noted further that Appellants themselves allege that they are unable to obtain insurance to indemnify the School District should an accident occur (Paragraph 17 of the complaint, A-10) and obviously neither the infant Appellant nor her parents can effectively waive or release the School District for liability should she lose the vision of her remaining good eye. That the risk is present is medically supported both by the School Physician (A-50) and the Appellant's ophthalmologist (A-16).

It is respectfully submitted that where the solely irreparable injury alleged is denial of participation in contact sports, and the granting of a preliminary injunction would result in an increase of medical risk, public liability exposure and the judicial over-ruling of a public purpose, the request for a preliminary injunction should be denied.

CONCLUSION

For the foregoing reasons, Appellees submit that the decision of the Court below denying the application was

correct as they have shown neither a probability of success or irreparable harm. The Order of the District Court should be affirmed and the injunction denied.

Dated: October 21, 1976.

Respectfully submitted,

Thomas W. Sullivan

Thomas W. Sullivan, Esq.

SULLIVAN, GOUGH, SKIPWORTH,
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Attorneys for Defendants, Harris,
Bent and Hibschman, in his
apacity as Superintendent.
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In the

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JACK A. KAMPMEIER, et al,

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-vs-

DOCKET #76-7383

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Defendants-Appellees.

ON APPEAL FROM THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
Civ 76-167

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

NANCY L. DELLA PENTA, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides at 40 Rochester-Junction Road, Honeoye Falls, New York, 14472. That on the 25th day of October, 1976 deponent served 3 copies of the brief of the Appellees, Nancy Harris, George R. Bent and Richard Hibschman, Individually and in his capacity as Superintendent

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1020 REYNOLDS ARCADE
ROCHESTER, NEW YORK 14614

of Schools, Pittsford Central School District, in the above entitled matter on Robert D. Stone, Esq., Lawrence W. Reich, Esq., of counsel, who appear as attorneys for the Appellees, Nyquist and Soucy, at the Education Building, Albany, New York, 12234, the address designated by said attorneys for that purpose, by depositing the same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department in the City of Rochester, New York.

Nancy L. Della Penta

NANCY L. DELLA PENTA

Sworn to before me this

29th day of October, 1976.

Thomas W. Sullivan

NOTARY PUBLIC

THOMAS W. SULLIVAN
NOTARY PUBLIC, State of N. Y. Monroe Co.
My Commission Expires March 30, 1976

LAW OFFICES
SULLIVAN, GOUGH, SKIPWORTH,
SUMMERS & SMITH
1020 REYNOLDS ARCADE
ROCHESTER, NEW YORK 14614

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that
deponent is the in the within action; that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s)
for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir :- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

SULLIVAN. GOUGH. SKIPWORTH. SUMMERS & SMITH

Attorneys for

Office and Post Office Address

1020 REYNOLDS ARCADE BUILDING
ROCHESTER. NEW YORK 14614

To

Attorney for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated.

Yours, etc.,

SULLIVAN. GOUGH. SKIPWORTH. SUMMERS & SMITH

Attorneys for

Office and Post Office Address

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ROCHESTER. NEW YORK 14614

To

Attorney for

Index No. Year 19

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U. S. COURT OF APPEALS COURT

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ORIGINAL

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Attorneys for

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To

Attorney for

Service of a copy of the within

is hereby admitted

Dated.

Attorney for

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STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

WILLIAM LEWIS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 105 Keswick Rd., Rochester, N.Y., 14609.

That your deponent personally served three copies of the brief of the Appellees, Nancy Harris, George R. Bent Richard Hibschman, Individually and in his capacity as Super-

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intendent of Schools, Pittsford Central School District, in the above entitled matter upon Harter, Secrest and Emery at 700 Midtown Tower, Rochester, New York, 14604, who appear as attorneys for the Appellees, Andrews, Burns, Farnsworth, Hosenfeld, Kolb, Lundy, McGavern, Pitler and Skawski, in regard to the above captioned matter on the 25th day of October, 1976 and upon Harris, Beach and Wilcox, Two State Street, Rochester, New York, 14614, who appear as attorneys for the Appellants, Kampmeier, et al, on the 29th day of October, 1976.

William C. Lewis

WILLIAM LEWIS

Sworn to before me this
29th day of October, 1976.

Notary Public

COMMISSIONER OF DEEDS

LAW OFFICES
SULLIVAN, GOUGH, SKIPWORTH,
SUMMERS & SMITH
1020 REYNOLDS ARCADE
ROCHESTER, NEW YORK 14614

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

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STATE OF NEW YORK, COUNTY OF

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Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

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That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir :- Please take notice that the within is a (*certified*) true copy of a
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Dated,

Yours, etc.,

SULLIVAN, GOUGH, SKIPWORTH, SUMMERS & SMITH

Attorneys for

Office and Post Office Address

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Attorney for

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ROCHESTER, NEW YORK 14614

To

Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for